Date: December 11, 1995

Case No: 94-ERA-15

In the Matter of:

STEVEN BOUDRIE,

Complainant,

v.

COMMONWEALTH EDISON COMPANY,

&

BECHTEL CONSTRUCTION COMPANY,

Respondents.

Appearances:

Stephen M. Kohn, Esq.
David K. Colapinto, Esq.
Kohn, Kohn and Colapinto
Washington, D.C.
For the Complainant.

Robert M. Rader, Esq.
Winston and Strawn
Washington, D.C.
For the Respondent ComEd.

Glenn D. Newman, Esq.
Commonwealth Edison Company
Chicago, Illinois
For the Respondent ComEd.

Steven G. Rudolf, Esq.
Vedder, Price, Kaufman and Kammholz
Chicago, Illinois
For the Respondent Bechtel.

Before: DANIEL J. ROKETENETZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Energy Reorganization Act of 1974, ("the Act"), as amended 42 U.S.C. § 5851, and its implement

ing regulations, 29 C.F.R. Part 24. Section 5851(a) of the Act prohibits a Nuclear Regulatory Commission ("NRC") licensee and its subcontractors from discharging or otherwise discriminating against an employee who has engaged in protected activities as set forth in the Act.

On September 26, 1994, Steven Boudrie ("Complainant") filed a timely complaint[1] with the Department of Labor against NRC licensee Commonwealth Edison Company ("ComEd" or "Respondent") and its subcontractor, Bechtel Construction Company ("Bechtel"), for whom the Complainant was employed. The Complainant alleges that he was subjected to harassment and a hostile work environment in violation of the Act. The Complainant and Bechtel have reached an amicable settlement, and accordingly, Bechtel is dismissed from this action. (See Appendix A) Conversely, ComEd contends that the Complainant voluntarily requested, and was granted, a lay-off by his employer, Bechtel, and that no discrimination occurred with regard to the Complainant's compensation, terms, conditions or privileges of employment during his work at ComEd's Zion facility.

On December 12, 1994, following an investigation, the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, concluded that Complainant had not been terminated in retaliation for engaging in protected activities, but rather he had been terminated because he refused to accept a reassignment for the short time remaining on the project. On December 16, 1994, Complainant appealed the Administrator's determination by way of letter to the Department of Labor's Chief Administrative Law Judge. The matter was docketed in the Office of Administrative Law Judges in Washington, D.C. on December 19, 1994, and assigned to the undersigned in January, 1995. On January 30, 1995, an Order was issued setting the case for a hearing on March 8, 1995, in Chicago, Illinois. A formal hearing in this matter was held before the undersigned on March 8 and 9, 1995 in Chicago.

ISSUES

The issues in this case are:

1. Whether the Complainant was subjected to harassment constituting a hostile work environment during his employment with Bechtel Construction at ComEd's Zion Nuclear Power Plant;

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[1] The ERA permits 180 days for filing a complaint of discrimination under its employee protection provision. 24 C.F.R. § 5852(b)(1). The Complainant filed his complaint within 180 days of his alleged "constructive discharge" with the Respondents on April 8, 1994. Thus, the complaint filed on September 26, 1994 is timely.

2. Whether the hostile work environment was created in retaliation for Complainant's protected activities under the Act; and,

3. Whether the hostile work environment forced the Complainant to terminate his employment with the Respondents thereby constituting a discriminatory constructive discharge.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

Respondent Commonwealth Edison operates the Zion Nuclear Power Plant ("Zion") in Zion, Illinois. Respondent Bechtel Construction Co. was the primary contractor supplying labor during the plant's "outage" in 1993-94. In the course of maintenance, the Zion facility went into a phase called "outage" during which routine repair, cleaning and general maintenance were performed. During the outage, ComEd needed laborers to complete the "outage activities" and contracted with Bechtel to supply such labor. In late 1993 and through early 1994, Bechtel supplied ComEd with as many as 800 laborers. As the outage activities were completed in certain units of the plant, these units were reactivated and the laborers hired during the outage were laid off.

The Complainant is a twenty-seven year old high school graduate who is a member of a laborers union. (Tr. 125) The Complainant testified that he has five years of experience working in nuclear power plants. Id. In the autumn of 1993, Bechtel Construction hired the Complainant to work in ComEd's Zion plant as a laborer during the plant's outage. Id. The Complainant started his assignment at ComEd on October 10, 1993 and continued to work as a laborer at Zion until his layoff on April 8, 1994.

The series of events leading to this action took place between March 16, 1994 and April 7, 1994, and primarily during the first week of April. The Complainant's position at ComEd was as a member of the "As Low As Reasonably Achievable" (ALAR) crew. (Tr. 127) The ALAR crew worked in the decontamination (decon) pad in the auxiliary building, where there primary job task was decontaminating tools. (Tr. 130) When working on the decon pad, the Complainant wore protective clothing over his modesty garments, which consisted of shorts and a T-shirt. Monitors checking for radioactive particles were located in the mask room, outside the auxiliary building, and at the gatehouse entrance to the facility. (Tr. 132)

The Complainant testified that he began setting off the monitors periodically in February, 1994. (Tr. 131) However, the primary incident occurred on March 13, 1994. Id. On March 13, 1994, at the end of his shift, the Complainant changed out of his protective clothing and into his personal clothing which he had worn to the plant that day. Id. The Complainant then exited the auxiliary building and passed through the monitors. However, upon attempting to exit the facility, the monitors at the guardhouse lit up "head to toe," thereby indicating that the Complainant was carrying radioactive particles on his person. (Tr. 133-136) The technicians at the guardhouse sent the Complainant back to the auxiliary building where he again passed through the monitors without activation. Id. The Complainant then returned to the guardhouse where he again activated the monitors upon attempting to leave. Id. Subsequently, the Complainant was sent to the mask room. Id. The mask room technicians found some contamination on the back of the Complainant's neck and instructed him to take a decontamination shower. Id. After his shower, the Complainant again put back on his clothes and passed through the mask room monitor. Id. Subsequently, however, the Complainant once again activated the guardhouse monitor. Id. Thereafter, the Complainant returned to the mask room where the technicians told him to wear a paper suit home. Id. The Complainant's clothes were placed in a plastic bag and he was instructed to wash the clothes twice. Id. The Complainant went home and washed his clothes as instructed. Id.

On March 15, 1994, the Complainant again activated the auxiliary building monitor upon ending his shift. (Tr. 140) A radioactive particle was discovered on the Complainant's sweatshirt. Id. The sweatshirt was one of the items of clothing that the Complainant had washed on March 13, 1994. (Tr. 141) Furthermore, the Complainant testified that he wore the same sweatshirt to work on March 14, 1994 and did not activate any monitors. (Tr. 142)

On March 16, 1994, the Complainant activated the guardhouse monitor upon entering the facility to begin his shift. (Tr. 144) After a series of body counts, a radioactive particle was found in the pocket of his denim pants. Id. These pants were also among the articles that the Complainant washed on March 13, 1994. (Tr. 145) Toward the end of his shift on March 16, the Complainant was instructed to meet with Michael Zeien, ComEd's contamination control coordinator, in Zeien's office. (Tr. 146) Zeien asked the Complainant if he would consent to the inspection of his motel room by ComEd technicians later that day. (Tr. 147) The Complainant consented and Zeien, along with ComEd technician Frank Palanski, union steward Bob Johnson, and Bechtel ALAR coordinator Dana Houston went to the Complainant's motel room on the evening of March 16, 1994. (Tr. 148) Using a hand-held monitor, Frank Palanski examined the Complainant's clothes and discovered some radioactive particles. (Tr. 148-49) Subsequently, the Complainant began taking photographs of Palanski and Zeien. (Tr. 150) The Complainant testified that he wanted to document the search. Id.

Mr. Zeien angrily reacted to the Complainant taking his photograph. (Tr. 51; 151) The Complainant testified that Zeien physically threatened him. (Tr. 151) Zeien testified that he simply stated "don't take any pictures of me, buddy boy." (Tr. 51) Zeien said he was angry because of the contamination discovered in the motel room. (Tr. 54) Zeien further testified that he reached his hand toward the Complainant and requested the Polaroid photograph of himself. (Tr. 53) The Complainant refused to surrender the photographs and then ordered everyone to leave his apartment or he would telephone the police. (Tr. 152) Zeien then apologized for upsetting the Complainant. (Tr. 56) Thereafter, it was agreed that Zeien and Palanski would leave and Houston and Johnson would await the arrival of Nuclear Regulatory Commission (NRC) officials. (Tr. 152) The NRC officials arrived later and searched the Complainant's entire motel room and his car. (Tr. 153-54) Later that night, Sonny Traver, Bechtel's general foreman, telephoned the Complainant and told him to report to work on the day shift the next morning, as opposed to reporting at midnight for the night shift as had been the Complainant's assignment. (Tr. 155)

Upon reporting to work on March 17, 1994, the Complainant was met by Dana Houston, who informed him that a meeting would be held later that day. (Tr. 156) Subsequently, the Complainant met with Greg Kassner, Health Physics Services Supervisor of the Zion facility, and Bob Johnson. (Tr. 157) At the meeting, the Complainant expressed his concerns over the apparent inefficiency of the monitors. Id. The Complainant testified that he was not satisfied with the answers he was given, so he immediately went to talk with NRC official Pat Louden. Id.

The Complainant did not report to work on March 18, 1994 because he was having nightmares about the contamination incidents and he was "really stressed out." (Tr. 158) However, later that day, the Complainant came to the facility to speak with Bruce McKenzie, the Bechtel site manager. (Tr. 159) The meeting with McKenzie was arranged by the Complainant's business manager, who the Complainant had telephoned earlier on that same day. Id. The Complainant testified that McKenzie told him that Bechtel was "behind [him] 100%." Id. Bruce McKenzie testified that the Complainant was moved to the day shift to facilitate the contamination investigation because most of ComEd's management worked the day shift. (Tr. 108) McKenzie also testified that he told the Complainant that he heard that ComEd was going to terminate the Complainant's security clearance. (Tr. 102) However, the Complainant's security clearance was never terminated. (Tr. 120-21)

The Complainant also testified that he spoke with a reporter from his hometown newspaper, the Monroe (MI) Evening News, because he was concerned about the contamination. (Tr. 160-163) However, the Complainant did not contact any other media outlet. (Tr. 164) Furthermore, Monroe, Michigan is approximately 300 miles from the Zion facility. Id. Additionally, the Complainant testified that

all of his contamination incidents were below the NRC levels for permissible exposure, but that nonetheless, he was extremely concerned and believed that contacting the media was proper. (Tr. 165)

The Complainant also experienced two separate incidents of contamination on April 5, 1994. (Tr. 165) Upon leaving the decon pad and activating the monitor, contamination was discovered on the Complainant's modesty garments. (Tr. 166) Later, contamination was found on the Complainant's turtleneck at the guardhouse monitor. (Tr. 166-67)

On the morning of April 6, 1994, the Complainant again met with Michael Zeien. (Tr. 167) Zeien wanted to discuss the personnel contamination event (PCE) forms that the Complainant had completed following his contamination events. (Tr. 168) Zeien also wanted to determine whether the Complainant's contamination was caused by the failure of the protective clothing or the improper use of protective clothing. (Tr. 73) Zeien testified that he was disturbed by the Complainant's flippant answer to one question. (Tr. 76) A question on the PCE form requested the employee to suggest possible ways to prevent contamination, to which the Complainant answered "not come to work." Id. Zeien responded that the Complainant should not "screw around" with the forms. (Tr. 170) The Complainant further testified that Zeien wanted to know about safety violations being committed by other employees. Id. The Complainant stated that before he could give such information, he needed protection from ComEd. Id. Zeien allegedly declined to offer the Complainant protection and informed him that it was the Complainant's duty to report violations. (Tr. 171) The Complainant testified that Zeien told him that the modesty garment contamination would be classified as "improper use of protective clothing" and the turtleneck contamination would be classified as "undetermined." (Tr. 172) The Complainant did not believe that "improper use of protective clothing" was accurate because he believed he used the protective clothing properly. Id. In actuality, the incident was classified as "failure of protective clothing" which indicated that the contamination was not the Complainant's fault. (Tr. 75-76) After his meeting with Zeien, the Complainant spoke with a NRC official who allegedly informed him that it was not his job to report safety violations by co-workers. (Tr. 172-73)

On the morning of April 7, 1994, Zeien went to the decon pad to observe the work practices of the deconners, including the Complainant. (Tr. 496-97) Zeien testified that he found it necessary to observe the workers himself because the Complainant was uncooperative with his attempt to determine the cause of the contamination. Id. The Complainant testified that he was intimidated by Zeien's presence and wondered if Zeien was looking for a reason to fire him. (Tr. 176-77) Both the Complainant and Zeien testified that an exchange occurred between the men. (Tr. 80; 176) The Complainant alleges that Zeien described his work in a

derogatory manner and blamed him for the contamination. (Tr. 175)

Thereafter, the Complainant complained to his foreman, Gene Smith, and Bechtel general foreman Sonny Traver about Zeien's "harassment." (Tr. 177-78) At 9:30 A.M. on April 7, the Complainant spoke with Sonny Traver, who offered the Complainant a layoff so to avoid Zeien's "harassment." (Tr. 230) Immediately upon leaving his meeting with Traver, the Complainant testified that he was physically threatened by a co-worker because the co-worker believed the Complainant was reporting him to management. (Tr. 181) The Complainant believed that the co-worker was suspicious after he saw the Complainant talk to Sonny Traver at break time. (Tr. 230) A short time thereafter, the Complainant was assigned to work on the roof of the building picking up pieces of plastic. (Tr. 180) After working for approximately two hours on the roof, the Complainant requested to Traver that he be laid off. (Tr. 235) The Complainant was laid off, at his request, beginning April 8, 1994.

Applicable Law:

The basis for this complaint is the allegation that Respondent ComEd, specifically through the actions of its Contamination Control Coordinator Michael Zeien, harassed the Complainant and created a hostile work environment. The Complainant alleges that such harassment was in retaliation for voicing concerns regarding ComEd's contamination monitors and the frequency of his contamination. Furthermore, the Complainant alleges that ComEd's harassment forced his requested layoff, thereby constituting a constructive discharge. Such being the case, the Complainant contends that ComEd's actions are in violation of the Act. Forty-two U.S.C. § 5851(a) states that no employer subject to the Act "may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activity.

In order to satisfy a prima facie case of discrimination under the ERA's employee protection provision, the Complainant must demonstrate that:

1) the party charged with discrimination is an employer subject to the Act;
2) the employee engaged in protected conduct;
3) the employer took some adverse action against the employee; and,
4) the protected conduct was the likely reason for the adverse action.

DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983) (ERA claim). Under the ERA's implementing regulations, as amended, the Complainant is required to prove that his protected conduct was a "contributing factor" in the unfavorable personnel action alleged in the complaint in order to make out a prima facie case under the

Act. 42 U.S.C. § 5851(b)(3)(C). However, the Secretary has interpreted the regulations to require simply that a complainant present evidence "sufficient at least to raise an inference" that the protected activity was the likely motive for the adverse action. Howard v. Tennessee Valley Authority, 91-ERA-36 (Sec'y Jan. 13. 1993). If the Complainant does not make this prima facie showing, the complaint must be dismissed. 42 U.S.C. § 5851(b)(3)(A). Furthermore, if the complaint's alleged facts, even if proven, nonetheless fail to make out a prima facie case of discrimination and thereby fail to entitle him to relief against the named Respondent under the whistleblower provision, then the complaint must be dismissed.

In the case now before me, the parties are in agreement that ComEd satisfies the Act's definition of employer. Furthermore, no dispute exists that the Complainant engaged in protected activity under the Act. He voiced his concerns over his continued contamination internally to both ComEd and Bechtel management, and he also reported such contamination to outside entities including NRC officials and the media. Thus, due to his protected activity, the Complainant is protected under the Act from discrimination at the hands of ComEd. Therefore, I find that the Complainant has satisfied the first two elements of his discrimination claim.

Consequently, my focus shifts to the third and fourth elements of the Complainant's discrimination claim. The record is clear that the Complainant voluntarily separated himself from Bechtel's employ at ComEd's Zion Nuclear Power Plant on April 7, 1994. Furthermore, I find that ComEd took no overt adverse employment action against the Complainant, i.e. transfer, suspension, discharge, etc.,[2] which would satisfy the third element of the Complainant's prima facie case. Therefore, the issue turns to whether sufficient evidence exists to support the Complainant's contention that he was subjected to a hostile work environment, and subsequently forced to resign, as a result of having voiced safety concerns.

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[2] Evidence was presented indicating that the Complainant was instructed to leave the decon pad and work on the roof on the morning of April 7, 1994, the last day of his employment with ComEd. The Complainant requested to be laid off approximately two hours thereafter. Such being the case, I am unable to determine whether the ComEd's transfer of the Complainant to work on the roof was permanent, which could constitute an adverse employment action, or simply a brief and temporary assignment after which the Complainant would return to the decon pad. Because the Complainant's transfer to the roof was terminated by the Complainant's requested lay-off, I cannot find that such transfer constitutes an adverse employment action.

As stated, the Act prohibits an employer from discriminating against an employee for engaging in protected activities. The Secretary of Labor has interpreted the Act to protect employees not only from retaliatory discharge or suspension, but also from harassment constituting a hostile work environment. English v. General Dynamics Corp., 85-ERA-2 (Sec'y February 13, 1992). The Secretary suggested that the Supreme Court's standard set forth in Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), a sexual harassment case under Title VII, should be applied when determining whether the alleged conduct amounts to harassment constituting a hostile work environment.

In Meritor, the Supreme Court defined the type of conduct which would constitute a hostile work environment. In order for harassment to rise to the level of discriminatory conduct, it must be "sufficiently severe or pervasive 'to alter the conditions of [the Complainant's] employment and create an abusive working environment.'" Meritor, supra, at 67 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1980). The Court further noted, however, that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment." Meritor, supra, at 67. A "mere utterance of . . . [an] epithet which engenders offensive feelings in an employee would not affect the conditions of employment to sufficiently significant degree" to constitute prohibited discrimination. Id. (quoting Rogers, supra.)

It is the Complainant's burden in a hostile work environment discrimination claim to prove by a preponderance of the evidence that:

> 1) he was subjected discriminatory conduct;
> 2) that such conduct was unwelcome and abusive to him at the time it occurred; and,
> 3) that such conduct permeated the workplace and was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment" as viewed by a reasonable person.

Harris v. Forklift Systems, Inc., 507 U.S. ___, 114 S. Ct. 367 (1993)(citing Meritor, supra.) Thus, the Supreme Court has declared that evidence of an alleged hostile work environment must satisfy both an objective and subjective test in order to constitute discriminatory conduct. The Court stated that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive" is not discriminatory. Id., 507 U.S. at ___, 114 S. Ct. at 370. "Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment" and there is no violation. Id.

The United States Court of Appeals for the Seventh Circuit, under whose appellate jurisdiction this complaint arises, has recognized that the line which separates "a merely unpleasant working environment" and a "hostile" one is not bright. Baskerville v. Culligan Int'l Co., 50 F.3d. 428, 431 (1995). Thus, whether or not certain workplace interactions amount to the creation of a hostile work environment relies primarily on the specific persons and situations involved. The Seventh Circuit has listed some criteria to consider when determining the extent of possibly hostile activity. Such criteria include: whether the remark was made in a public or private setting, accompanied by a threatening gesture, or delivered a short distance from the victim's face so to invade the victim's private space; as well as the disparity in size, if any, between the harasser and the victim. Id. The Supreme Court also identified several factors to consider when determining whether the conduct alleged rises to a level of impermissible harassment. Harris, supra, at 369. Such factors are: 1) the frequency of the harassing conduct; 2) its severity; 3) whether it is physically threatening or humiliating, or a mere offensive utterance; 4) whether it unreasonably interfered with an employee's work performance; and 5) whether it results in psychological injury to the victim. Id.

Additionally, the Seventh Circuit has stated that "the employer's legal duty is discharged if it takes reasonable steps to discover and rectify acts of . . . harassment of its employees." Id., at 432. Thus, if "prompt and appropriate remedial action" to correct workplace harassment is taken, the employer suffers no liability. Id. (citing Carmon v. Lubrizol Corp., 17 F.3d 791, 194 (5th Cir. 1994). If, however, the alleged conduct by the employer and its agents "did not even reach the threshold at which it could reasonably be thought to create a hostile working environment," no remedial action is required of the employer. Id.

Furthermore, circumstances that might adequately establish a hostile work environment will not necessarily suffice to establish a constructive discharge. Landgraf v. USI Film Prod., Inc., 968 F.2d 427, 430 (5th Cir. 1990). Thus, in order for an employee to succeed in proving he was constructively discharged, and thereby obtain back pay (a remedy sought by the Complainant), he must prove that his employer made his working conditions so intolerable that a reasonable person would have believed he has no real choice but to quit. Chambers v. American Trans. Air, Inc., 17 F.3d 998, 1005 (7th Cir.), cert. denied, 115 S. Ct. 512 (1994). Employer conduct which detracts from an employee's work performance or discourages him from remaining on the job may constitute a hostile work environment, but in order to establish a constructive discharge, the severity and the pervasiveness of the harassment must be so great to compel the reasonable person to resign. Saxton v. American Tel. & Tel., Co., 10 F.3d 526, 536-37 (7th Cir. 1993); See also Harris, supra, at 114 S. Ct. at 370-71.

The Complainant bases his complaint on his contentions that after he voiced safety concerns regarding the contamination of his clothing with radioactive particles and the failure of certain monitors to detect such contamination, he was harassed, subjected to a hostile work environment, and eventually forced to request a lay-off as the only means of escaping the hostile environment. Specifically, the Complainant alleges: 1) he was continually contaminated with radioactive particles and thus subjected to unsafe working conditions; 2) he was physically threatened by Michael Zeien after he took a photograph of Zeien during ComEd's inspection of his motel room and wardrobe; 3) he was verbally harassed by Zeien in Zeien's office when Zeien informed him "don't screw around with me;" 4) he was harassed by Zeien when Zeien observed him working and then told the Complainant he did not "know how to f---ing work properly;" 5) he was physically threatened by co-worker Michael Johnson who suspected the Complainant of reporting him to superiors; and 6) he was transferred to a job on the roof which he did not enjoy.

Certainly, even assuming all the Complainant's allegations to be true, no single incident stands out as sufficiently hostile in and of itself to constitute a hostile work environment or compel a reasonable person to resign. Presumably, the Complainant relies on the cumulative effect of the allegedly discriminatory acts. Nonetheless, even the totality of these acts does not support an inference that the Complainant was forced to request a lay-off when he did. ComEd actively investigated the Complainant's contamination complaints. Furthermore, the Complainant testified that his level of contamination was below the NRC's permissible exposure. Thus, the Complainant's first allegation that ComEd harassed him by subjecting him to unsafe working conditions is meritless.

The Complainant also contends that Zeien harassed him on multiple occasions. Each of Zeien's alleged acts of harassment took place in the scope of investigating the Complainant's contamination. Initially, I note that I do not find that Zeien's actions, as described by the Complainant, constitute harassment, but rather examples of a supervisor exhibiting brief moments of anger at, what he believes to be, an uncooperative employee. Furthermore, even assuming Zeien's acts did constitute harassment, I find that such acts were not significantly severe or pervasive to create a hostile work environment. Finally, the record indicates that, although he had many opportunities, the Complainant did not complain about Zeien's harassment until his final hours at ComEd.

Next, the Complainant alleges that a co-worker's threat is evidence of the hostile work environment created by ComEd. No evidence was presented that ComEd knew anything about the threat to the Complainant by one of his co-workers. Thus, I do not find that the threat of physical violence, assuming it occurred, by a co-worker against the Complainant to be attributable to ComEd. Finally, no evidence was presented that the Complainant's assign-

ment to the roof was caused by discriminatory animus on the part of ComEd.

The Complainant appears to want it both ways. He wanted ComEd to correct the contamination problem, but he did not want Michael Zeien, ComEd's contamination control coordinator, to bother him about it. As aforementioned, the record indicates that ComEd was prompt in its efforts to correct the contamination events of which the Complainant complained. In fact, it was ComEd's attempts to correct the problem which constitutes the bulk of ComEd's alleged harassment toward the Complainant. During each of the Complainant's interactions with Zeien of which the Complainant complains, the purpose of the interaction was Zeien's attempts to solve the contamination mystery. Quite obviously, it was necessary for Zeien to interview the Complainant, examine his clothes and living quarters, and even observe his work in order to attempt to discern the cause of the contamination. Furthermore, it was the Complainant's lack of cooperation in the investigation that, at least in part, forced Zeien's zealous pursuit of the "root cause" of the unwanted contamination. Unfortunately, the Complainant was so offended by Zeien's pursuit of a resolution to the unwanted contamination problem that he accused Zeien of harassment.

As shown above, such a situation is not a hostile working environment in the eyes of the law, nor would it force a reasonable person to resign his employment. Even if I found Zeien to be "a heavy-handed manager who dealt poorly with subordinates (which I do not), that kind of manager is not a rare breed, and simple mismanagement does not constitute constructive discharge." Phaup v. Pepsi-Cola Gen. Bottlers, Inc., 761 F.Supp. 555, 561 (N.D. Ill. 1991)(quoting Miller v. Illinois, 681 F.Supp. 538, 544 (N.D. Ill. 1988). Consequently, I find that the actions of Michael Zeien were reasonable under the circumstances, and do not constitute a violation of the Act.

Finally, I find that more plausible explanations for the Claimant's requested layoff were presented. The record indicates that the Complainant's position with Bechtel working at ComEd's Zion Nuclear Power Plant was coming to an end. (Tr. 112) One week after the Complainant's layoff, the number of Bechtel laborers remaining at the Zion facility had been reduced to nine. Id. At most, the Complainant's position would have continued for four more weeks. (Tr. 114) Furthermore, many of the Complainant's friends had already been laid off when the Complainant requested a layoff. (Tr. 122) Thus, if an inference is to be drawn from the record, the most reasonable inference is that the Complainant quit because he knew his position was to be terminated in the near future.

Conclusion:

The Complainant has failed to prove, as a matter of law, that his claim of a hostile work environment should prevail. The

Respondent's actions, specifically the personal management style of Mr. Zeien, may have had an adverse effect on the Complainant, but such actions do not constitute actionable discriminatory conduct under the Act. Furthermore, I do not find that ComEd's treatment of the Complainant was so demonstratively pervasive nor so severe that it would compel a reasonable employee to request to be laid off. Consequently, the Complainant has failed to prove that ComEd created a hostile work environment or that he was constructively discharged. As such, the Complainant has failed to establish a prima facie case of discrimination under the ERA's employee protection provision. Accordingly,

RECOMMENDED ORDER

It is hereby RECOMMENDED that the complaint of Steven Boudrie against Commonwealth Edison Company be DISMISSED.

It is further RECOMMENDED that Respondent Bechtel Construction Company be DISMISSED from this action under the terms of the settlement agreement reached by the parties and submitted to the undersigned for consideration. (See Appendix A)

_____
DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).